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Supreme Court, U.S.
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No. 88-5276

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

DUNCAN PEDER McKENZIE, JR.,

Petitioner,

v.

JACK McCORMICK, Warden, Montana State Prison, and
MICHAEL GREELY, Attorney General of the State of Montana,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is harmless error analysis under Rose v. Clark, 478 U.S. 570 (1986), precluded because the jury instructions at petitioner's trial contained multiple violations of Sandstrom v. Montana, 442 U.S. 510 (1979)?

2. Does the holding of the Court of Appeals that, on the facts of this case, the giving of improper instructions was harmless beyond a reasonable doubt, conflict with Rose or with decisions of other circuit courts on the same issue?

3. Does United States v. Jackson, 390 U.S. 570 (1968), invalidate a sentence of death imposed by the trial judge on a jury verdict finding petitioner guilty of two capital crimes where the sentencing judge had agreed prior to trial to impose a lesser sentence if the parties reached a plea agreement calling for a plea of guilty to non-capital lesser-included offenses?

4. Did the sentencing judge, who was found by the state courts and the courts below to have weighed all evidence of mitigating circumstances prior to imposition of sentence, violate the Eighth Amendment by imposing the death penalty based on his finding that "there are no circumstances which mitigate the defendant's conduct"?

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CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported sub nom. McKenzie v. Risley, 842 F.2d 1525 (9th Cir. 1988) (en banc). Pet. App. A-1 to A-49.[1/] The panel opinion is reported at 801 F.2d 1519 (9th Cir. 1987). Pet. App. A-50 to A-62. The opinion of the district court granting partial summary judgment against petitioner and the district court's findings of fact, conclusions of law, and memorandum opinion following the evidentiary hearing are not reported. The summary judgment order is set forth in Pet. App. B. The evidentiary hearing findings, conclusions, memorandum, and order are attached hereto as Appendix I (hereafter abbreviated to "App."). The various opinions of the Montana Supreme Court on petitioner's appeals are cited in the district court's summary judgment order. Pet. App. B-2 to B-3.

JURISDICTION

Respondent agrees that this Court has jurisdiction of the petition for the reasons stated in the petition at 2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions and statutes cited in the petition at 2, this case involves Mont. Rev. Codes Ann., section 93-1301-7(2), (3) (1947), now

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[1/] Citations to matters found in the Appendix to the Petition for Certiorari will be abbreviated "Pet. App." References to the transcript of the evidentiary hearing in the district court are abbreviated "H. Tr." Other abbreviations follow the format set forth in the Petition at 3 n.3.

codified at Mont. Code Ann., section 26-1-602(2), (3) (1987):[2/]

> All other presumptions may be controverted. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:
>
> ....
>
> 2. That an unlawful act was done with an unlawful intent.
>
> 3. That a person intends the ordinary consequence of his voluntary act.

Additional statutory citations are set forth in App. II.

STATEMENT OF THE CASE

Petitioner was found guilty in January 1975 of the offenses of deliberate homicide by means of torture and aggravated kidnapping following a jury trial in the District Court for the Eighth Judicial District of the State of Montana, the Honorable R. J. Nelson presiding. The convictions arose from the brutal beating death of Lana Harding, a country school teacher who in January 1974 had been abducted from her rural Montana teacherage and found dead in a farmer's field several miles away. Her partially dressed body bore numerous injuries to the head inflicted with a blunt object. There was evidence she had also been strangled with a rope and sexually assaulted.

[2/] Petitioner erroneously asserts that the instructional errors in this case and in Sandstrom v. Montana, 442 U.S. 510 (1979), arose from the revised 1973 Montana Criminal Code, now codified at Mont. Code Ann., Tit. 45. Petition at 2. In fact, the statutory presumptions embodied in the Sandstrom instructions were codified in Montana law before the turn of the century. § 3266, Mont. Code Civ. P. (1895).

A. Plea Bargaining.

Some three weeks prior to trial defense counsel approached the prosecution with a proposed plea bargain. Discussions occurred over a two-day period. Findings of Fact 12, 13, App. I-3.[3/] The prosecutors took the position that they could not agree to a plea bargain without first discussing the matter with the parents of Lana Harding. FF 14, App. I-3. On December 22, 1974, prior to the prosecution's meeting with the Hardings, the parties discussed with Judge Nelson a tentative agreement which would have resulted in a sentence to a term of years in exchange for a plea of guilty to two non-capital lesser-included offenses, and the judge indicated he could accept such an agreement. The prosecution's concurrence in the agreement was contingent upon discussions with the Hardings and other factors. FF 20, App. I-4; H. Tr. 295, 304, 316-17, 340-41, 350. Following a December 26, 1974, conference with the Harding family, the prosecutors decided to withdraw from plea negotiations and take the case to trial, FF 25-29, App. I-5 to I-6, and they so informed defense counsel on December 28, FF 30, App. I-6.

Defense counsel moved to enforce the failed bargain, St. Ct. File Item 104, and petitioner offered to plead guilty to the two non-capital offenses as contemplated in the tentative agreement. December 30, 1974, St. Tr. 4. The prosecutors declined to participate in the bargain, and the court refused to enforce it. December 30, 1974, St. Tr. 5-6; St. Ct. File Item 105.

[3/] The citations to the findings and conclusions entered by the district court following the evidentiary hearing on the instant petition are abbreviated "FF."

B. Trial.

The evidence presented at trial established that the petitioner abducted and killed Lana Harding.[4/] The only significant contest at trial was over petitioner's mental competence and capacity. Petitioner asserted that he was not guilty by reason of mental disease or defect excluding his responsibility for the crimes, see Mont. Rev. Code Ann., § 95-501 (1947), App. II-1, and that because of mental disease he was incapable of forming the mental states which were elements of the charged offenses, see Mont. Rev. Codes Ann., § 95-502 (1947), App. II-1. He relied solely on the testimony of Dr. Robert Wetzler, a psychiatrist, who duly stated that petitioner was both insane and lacked sufficient capacity to form any kind of criminal intent. The prosecution countered with testimony from Dr. R. F. Gracia, a psychiatrist, and Dr. Edward Shubat, a clinical psychologist,[5/] both of whom disputed Dr. Wetzler's conclusions.

Prior to the receipt of testimony, the trial judge read 28 preliminary instructions to the jury. These included general omnibus-type instructions, a statement of the charges against the petitioner, a detailed definition of the prosecution's burden of proof beyond a reasonable doubt, and

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[4/] The court below summarized the evidence by quoting from the Montana Supreme Court's opinion on the third of four appeals it considered, State v. McKenzie, 186 Mont. 481, 608 P.2d 428, 434-36, cert. denied, 449 U.S. 1050 (1980). 842 F.2d at 1526-28, Pet. App. A-2 to A-4.

[5/] Petitioner erroneously identifies Dr. Shubat as a member of the staff of the Warm Springs State Hospital. Petition at 8. In fact, Dr. Shubat was a privately practicing clinical psychologist. St. Tr. 2533.

definitions of several pertinent statutory terms. Pet. App. A-31 to A-37.[6/]

Following trial, the judge read 25 additional instructions to the jury. In the course of their description of the method of proof applicable to the various crimes charged, the additional instructions contained several presumptions of the kind condemned by this Court in Sandstrom v. Montana, 442 U.S. 510 (1979). However, the instructions clearly and repeatedly told the jury that it could not rely on the Sandstrom presumptions to find that petitioner killed Lana Harding with one of the specific intents associated with the capital offenses of deliberate homicide by means of torture and aggravated kidnapping. Additional Instructions 32, 34, 36; Pet. App. A-39, A-41, A-42. The additional instructions also stated what was then Montana's version of the insanity defense. Additional Instruction 53,

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[6/] Petitioner gratuitously raises a number of questions which, although not relevant to the issues presented, are designed to discredit the state court proceedings. He asserts that the only definition of proof beyond a reasonable doubt is found in the instructions read to the jury prior to trial. Petition at 6. He neglects to inform the Court that the requirement of proof beyond a reasonable doubt was repeated to the jury in each of the additional instructions defining the charged offenses. Additional Instructions 33, 34, 35, 36, 37, 38; Pet. App. A-40 to A-43. Petitioner also ignores Additional Instructions 39 and 40, Pet. App. A-43 to A-45, which further define the reasonable doubt standard. Petitioner asserts that the charge to the jury deviated from the charging document and was not in accordance with Montana law. Petition at 7 and n.12. This is a question of state law which relates to none of the issues presented in the petition. He also asserts that the instructions on reasonable doubt were "flawed," in that they did not discuss doubts arising from lack of evidence and because they contained language referring to "moral certainty." Petition at 16 n.18. These allegations were not raised as separate issues in the petition filed in district court and accordingly should be deemed waived. They also ignore Additional Instruction 43, Pet. App. A-44, which stated in part: "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence, and upon the failure, if any, of the prosecution to prove every essential element of the particular charges against him."

Pet. App. A-46 to A-49. The additional instructions contained a detailed direction regarding the use of the multiple verdict forms provided for the offenses charged. Additional Instruction 54, Pet. App. A-48 to A-49. The preliminary and additional instructions were sent to the jury room in written form when the jury retired to deliberate. St. Tr. 2601. The jury returned a verdict finding petitioner guilty of two capital offenses, deliberate homicide by means of torture and aggravated kidnapping resulting in the victim's death.

C. Sentencing.

The jury returned its verdict of guilty on February 1, 1975. The Court ordered a presentence report, see Mont. Rev. Codes Ann., § 95-2203 (1947), App. II-1, and scheduled sentencing for March 3, 1975. The Court informed defense counsel that they could request a hearing on the report prior to sentencing. St. Tr. 2611. The presentence report was filed February 21, 1975. State Ct. File Item 161. On February 26, 1975, petitioner's counsel filed a "Petition and Motion in Mitigation," which contained a recital of the mitigating circumstances offered in relation to petitioner's sentencing. State Ct. File Item 162. A copy is attached hereto as App. III. The "Petition and Motion" acknowledges in paragraph 7 that the court had advised defense counsel "that it is receptive to, and will hear, any matter in mitigation." App. III-2.

Defense counsel did not request a hearing on the presentence report prior to the scheduled sentencing hearing. At the outset of the sentencing hearing, defense counsel informed the court that petitioner would "rest upon what is said in the Petition and Motion for Mitigation and not swear

witnesses, or present to this Court any evidence of what is contained in said Petition and Motion for Mitigation." St. Tr. 2611. The trial judge stated on record that he had read and considered the matter presented by the petitioner, St. Tr. 2612[7], and then read his prepared findings, conclusions, and sentencing order into the record, St. Tr. 2613-17. After discussing the evidence, including that presented at trial regarding the petitioner's background and mental condition, Finding 5, Pet. App. E-7 to E-8[8], the court concluded: "[T]here are no circumstances which mitigate the defendant's conduct or the sentence to be imposed." Conclusion of Law 2; Pet. App. E-9. The court then imposed the death penalty based on the jury's finding of two statutory aggravating factors--deliberate homicide by torture, Mont. Rev. Codes Ann., § 94-5-105(c) (1947), and aggravated kidnapping causing the victim's death, Mont. Rev. Codes Ann., § 94-5-304 (1947), and the absence of sufficient mitigation to call for leniency. See McKenzie v. Osborne, 195 Mont. 26, 49, 640 P.2d 368, 382 (1981). The court specifically found that each of the capital offenses of which petitioner was convicted was

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[7] The court stated: "Counsel, I received copies of your motion last week. I have considered and read them. If you have nothing further, your Petition and Motion for Mitigation is denied." St. Tr. 2612.

[8] Petitioner accuses the trial judge of misquoting Dr. Wetzler's testimony regarding petitioner's ability to distinguish right from wrong. Petition at 27. Petitioner accurately quotes Wetzler's testimony on rebuttal. St. Tr. 2575. He omits mention of the following portion of the prosecution's cross-examination of Wetzler's direct testimony:

> Q: Does [petitioner] have the ability to choose between right and wrong?
>
> A: [By Dr. Wetzler] Yes.

St. Tr. at 2286.

individually sufficient to warrant the death penalty. Findings of Fact 1, 2; Pet. App. E-6 to E-7; Conclusion of Law 1; Pet. App. E-9.

D. State Court Review.

The proceedings in state court regarding petitioner's conviction were summarized by the Court of Appeals. 842 F.2d at 1528; Pet. App. A-4.

E. Federal Habeas Corpus Review.

Petitioner filed a petition for federal habeas corpus relief in the United States District Court for the District of Montana pursuant to 28 U.S.C. § 2254, raising 21 separate issues. Petitioner voluntarily dismissed one claim, and another was dismissed without prejudice by stipulation of counsel. C.R. 80. The district court rejected 17 of the remaining claims as a matter of law, granting the State's motion for summary judgment. Pet. App. B. Following an evidentiary hearing the court found for the State on the remaining two issues. App. I.

As to the Sandstrom issue, the court held that the erroneous instructions were harmless beyond a reasonable doubt in light of the jury's finding, on proper instructions, that the petitioner had the capacity to form criminal intent. Pet. App. B-12 to B-19. The court also rejected petitioner's assertion that the plea bargaining invalidated his death sentence. The court distinguished United States v. Jackson, 390 U.S. 570 (1968), on the ground that the petitioner here was not put in jeopardy of the death penalty due to a decision to plead not guilty, but rather was not able to reach a plea agreement which would result in a lesser

sentence. App. I-12 to I-13.[2/] The court granted summary judgment on the issue of mitigating circumstances, noting that the State courts had found as fact that the trial judge fully considered all mitigating evidence, a finding which bound the district court under Sumner v. Mata, 449 U.S. 539 (1981). Pet. App. B-28.

F. Court of Appeals Decisions.

Petitioner appealed from the district court's judgment, raising 6 of the 21 contentions originally presented to the district court. A panel of the Ninth Circuit Court of Appeals affirmed the judgment. McKenzie v. Risley, 801 F.2d 1519 (9th Cir. 1986). On the Sandstrom issue, the panel found the error harmless in light of the overwhelming evidence of intent in the record. 801 F.2d 1523-26, Pet. App. A-54 to A-57. The panel declined to follow the previous holdings in the Ninth Circuit that Sandstrom error could never be harmless when intent was contested, see, e.g., In re Hamilton, 721 F.2d 1189 (9th Cir. 1983), finding them "no longer valid" in light of this Court's decision in Rose v. Clark, 478 U.S. 570 (1986). 801 F.2d at 1524, n.1, Pet. App. A-55. The panel did not reach the validity of petitioner's death sentence in light of the plea bargaining, finding consideration of the issue unnecessary in light of its holding that no enforceable bargain existed. 801 F.2d at 1528, Pet. App. A-59. The panel rejected the assertion that the trial judge failed to consider mitigating evidence,

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[2/] The court found as fact that there was no enforceable plea bargain following a three-day evidentiary hearing on the issue. Findings of Fact and Conclusions of Law, App. I. The court below affirmed this finding, 801 F.2d at 1526, Pet. App. A-57 to A-59, 842 F.2d at 1536 n.22, Pet. App. A-12, and petitioner has not challenged that finding in this petition.

noting that the trial judge was not precluded from considering mitigating evidence and that the judge "appears to have properly considered all relevant mitigating evidence and simply rejected it[.]" 801 F.2d at 1531; Pet. App. A-62.

Petitioner applied for rehearing en banc, raising three major contentions while asking the en banc panel to reconsider all issues raised on appeal. The court granted rehearing en banc, Order of April 29, 1987, and ordered supplemental briefing as to two questions pertaining to the Sandstrom issue, Order of May 20, 1987. Following rehearing before a limited en banc panel, see Ninth Circuit Rule 35-3, the court affirmed the judgment.

The court first rejected petitioner's assertion that the repeated use of Sandstrom presumptions in the jury instructions made harmless error analysis inapposite. The Court held that the seriousness of the Sandstrom error was "irrelevant" to the decision whether to apply the harmless error tests approved by this Court in Rose and in Pope v. Illinois, 107 S. Ct. 1918 (1987), 842 F.2d at 1530 and n.7, Pet. App. A-6, although acknowledging that "multiple erroneous instructions may make it more likely that the unconstitutional presumptions played a material role in the jury's decision." Id., n.7. The Court then found the erroneous instructions in this case harmless beyond a reasonable doubt.

With the exception of the unconstitutional presumptions, the instructions were clear and proper, the Court found. 842 F.2d at 1529 and n.2, Pet. App. A-5. In particular, the instructions contained a "clear and explicit" direction not to rely on the Sandstrom presumptions to find the particular specific intents associated with the offenses of which petitioner was convicted. 842 F.2d at 1532-33, Pet. App. A-8

to A-9. Since the jury must be presumed to have followed this "crystal clear" instruction, id. at 1533 n.15, Pet. App. A-9, in reaching its verdict, its finding of specific intent was constitutionally proper. The Court then reviewed the evidence and found that in reaching this constitutionally proper conclusion the jury necessarily rejected Dr. Wetzler's testimony and found petitioner capable of forming criminal intent. 842 F.2d at 1533, Pet. App. A-9. Since capacity to form intent was the only contested factual aspect of the intent issue, the jury's constitutionally proper resolution of the factual question rendered the Sandstrom instructions superfluous, and therefore harmless, beyond a reasonable doubt.

The Court affirmed the district court's ruling on the plea bargain issue as well. The Court construed Jackson to condemn statutes which punish a defendant for exercising his right to trial by subjecting him to a potential death sentence where the sanction is not available against those who plead guilty. According to the Court, Jackson is simply factually inapplicable where, as here, the defendant sought to plead guilty but did not because the prosecution refused to bargain. 842 F.2d at 1537, Pet. App. A-13. The Court also agreed with the district court on the sentencing issue, holding the trial judge fully considered all mitigating evidence and found it insufficient to justify leniency. 842 F.2d at 1541-42, Pet. App. A-17 to A-18.

REASONS FOR DENYING THE WRIT

I. THIS CASE PRESENTS NO IMPORTANT ISSUES UNDER ROSE AND SANDSTROM.

As the courts below observed, 842 F.2d at 1530, Pet. App. A-6, Summary Judgment Order, Pet. App. B-18, and as can

readily be perceived from the Statements of the Case, the facts of this case are unique. The trial judge gave concededly unconstitutional jury instructions as to offenses for which petitioner was not convicted along with instructions telling the jury that they could not rely on the unconstitutional presumptions in considering the specific intent issues for the two capital offenses of which petitioner was convicted. The jury returned a verdict with special findings which demonstrates that the jury found intent without reliance on the unconstitutional presumptions. The court below followed this Court's direction in Rose and considered the erroneous instructions in light of the entire record, finding them harmless beyond a reasonable doubt.

Petitioner engages in widespread mental and rhetorical gymnastics in an attempt to show that this sui generis case presents important issues which justify plenary review in this Court. He first weaves from an isolated footnote reference an argument that the court below departed from the admonition in Rose that reviewing courts must consider Sandstrom errors in the context of the entire record. He next asserts that the decision below conflicts with Eleventh Circuit precedent which is plainly distinguishable. He finally offers a tortured interpretation of three jury instructions, asserts that they present directed verdicts on issues of intent, and attempts from this inaccurate premise to demonstrate that the decision of the court of appeals conflicts with holdings from other circuits that such instructions cannot be harmless error. In fact, the court below did precisely as this Court directed in Rose. It considered the erroneous instructions in light of the entire record and concluded that despite the errors, the jury accurately resolved all contested issues of fact beyond a

reasonable doubt. The decision presents no grounds on which to grant the writ.

A. The Court Below Followed This Court's Decisions in Pope and Rose.

In Rose, this Court resolved a conflict among the circuits, holding that instructions which are erroneous under Sandstrom may be held to be harmless error, regardless of whether intent was contested at trial. The Court observed that Sandstrom presumptions--that intent is presumed from the voluntary acts of the accused--do not remove the issue of intent from the jury, since the presumption is not triggered until the predicate facts are found beyond a reasonable doubt. 478 U.S. at 583-84. Where a review of the entire record shows that no reasonable juror could have entertained a reasonable doubt as to the defendant's intent, the Sandstrom error is harmless. 478 U.S. at 581-82 and n.10; see Burger v. Kemp, 107 S. Ct. 3114, 3119-20 n.5 (1987).

The Court gave further content to the Rose holding in Pope. In considering whether a jury instruction in an obscenity case which misstated the reasonable person standard for evaluating the existence of serious literary, artistic, political, or scientific value in allegedly obscene material could be harmless, the Court explained an important factor underlying Rose: that harmless error analysis is designed to assure that "the facts that the jury necessarily found established guilt beyond a reasonable doubt." 107 S. Ct. at 1922. The issue under Rose thus is not whether the jury in fact followed the unconstitutional instruction, but rather whether, even if it may have, it would unquestionably have reached the same result without it. Id., n.6.

Petitioner's arguments in support of the petition fail to disclose an issue worthy of review by this Court. He first asserts that the court below departed from Rose by "holding that 'the presence of multiple erroneous instructions ... has no bearing on' the harmless error analysis." Petition at 16. This assertion mischaracterizes the court's analysis. The quoted statement, from footnote 7 of the court's opinion, refers primarily to the issue of whether harmless error analysis applies. Read in context, the footnote shows that the court properly rejected the assertion that multiple Sandstrom errors made harmless error analysis inappropriate, while acknowledging that "the presence of multiple erroneous instructions may make it more likely that the unconstitutional presumption played a material role in the jury's decision." 842 F.2d at 1530 n.7.[10/] Indeed, no one reading the entire opinion of the court could seriously contend that the court considered the instructions given to the jury in this case to be "irrelevant"; the court devotes a full five pages to a discussion of the circumstances which demonstrated that under the instructions the multiple Sandstrom errors in this case

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[10/] The entire footnote states:

"McKenzie and the dissent attempt to distinguish Clark by noting that it involved only one erroneous instruction, whereas multiple errors were committed at McKenzie's trial. This distinction is irrelevant. While the presence of multiple erroneous instructions may make it more likely that the unconstitutional presumption played a material role in the jury's decision, it has no bearing on whether the result would have been the same even absent the Sandstrom errors. Since even one Sandstrom instruction requires a reviewing court to assume that the jury in fact relied on the improper presumption in reaching its verdict, multiple Sandstrom instructions cannot compound the error. We reject the dissent's apparent suggestion that the nature of our inquiry varies with the number of erroneous instructions." 842 F.2d at 1530-31 n.7.

were harmless, explicitly rejecting petitioner's arguments that the multiple erroneous instructions infected the jury's fact-finding function.

Petitioner also mischaracterizes the jury instructions at issue. He repeatedly asserts that the instructions were an "extraordinarily confusing and contradictory verbal morass," citing as support the dissenting opinions in the court below and in the Montana Supreme Court. The majority opinion in the court below met these assertions head-on, finding that except for the Sandstrom errors the instructions "accurately reflected the state of the law when given ... , were not confusing, contradictory, or incoherent, ... were entirely adequate, and provided the jurors with an appropriate and understandable framework to guide their deliberations." 842 F.2d at 1529 n.2. See infra at 18-20. Even as to those offenses for which the jury was instructed to presume intent,[11/] the presumption had no effect unless the jury found the predicate facts--the voluntary acts--beyond a reasonable doubt. See, e.g., Additional Instruction 33, Pet. App. A-40 ("If you find beyond a reasonable doubt that the defendant ... voluntarily committed an illegal act on Lana Harding, such as assaulting or injuring her, the law presumes that an unlawful act was done with unlawful intent. ... This is a rebuttable presumption.")

Petitioner is simply resurrecting an issue finally settled by this Court two years ago in Rose. The Court has considered and rejected the position advanced by the

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[11/] The court below observed that in fact the instructions as to deliberate homicide by means of torture, Additional Instruction 34, Pet. App. A-41, and aggravated kidnapping, Additional Instruction 36, Pet. App. A-42, contained no Sandstrom presumptions at all.

petitioner and the dissenting judges below, i.e., that harmless error analysis does not apply to Sandstrom errors in cases in which intent is a disputed issue. Rose, 478 U.S. at 583-84. The Court has clearly stated that the existence of Sandstrom error is analytically distinct from the question of whether the error was harmless. Rose, 478 U.S. at 582 n.11; Pope, 107 S. Ct. at 1922 n.6. The court below accurately perceived this distinction. Petitioner does not, and he now seeks to reopen the question and inject further uncertainty into this settled area of law. The Court should decline the invitation to do so.

B. The Decision of the Court Below Does Not Conflict with Holdings From Other Circuit Courts.

1. The Eleventh Circuit Holdings Cited by Petitioner Are Distinguishable.

Petitioner asserts that the decision of the court of appeals conflicts with the holdings of the Court of Appeals for the Eleventh Circuit in Bowen v. Kemp, 832 F.2d 546, 548 (11th Cir. 1987) (en banc), cert. denied, 108 S. Ct. 1247 (1988).[12/] In Bowen, the Eleventh Circuit held that under Rose a Sandstrom error was not harmless where intent was at issue and the evidence of intent was not overwhelming. Bowen should be distinguished on its facts. In that case, the jury was given a single simple Sandstrom instruction, and it returned a general verdict of guilt. The jury was not instructed not to rely on the Sandstrom presumption to find specific intent, and accordingly, its verdict did not show

12/ Petitioner also cites three other Eleventh Circuit cases, Corn v. Kemp, 837 F.2d 1474 (11th Cir. 1988), Godfrey v. Kemp, 836 F.2d 1557 (11th Cir. 1988), cert. pending, No. 87-1916 (May 21, 1988), and Dick v. Kemp, 833 F.2d 1448 (11th Cir. 1987). These cases simply follow Bowen, and are distinguishable from the present case on the same grounds.

that it found the presence of such intent beyond a reasonable doubt without reliance on the presumption.[13/]

The observation that from a general verdict it is generally not possible to tell how the jury evaluated the evidence on the issue of intent, see, e.g., Sandstrom, 442 U.S. at 526, simply does not apply to this case. The verdict here convicts of two specific intent crimes, both of which were submitted to the jury on instructions which directed the jury not to use the Sandstrom presumption to determine whether petitioner could form specific criminal intents. The Court must assume the jury followed this instruction. Francis v. Franklin, 471 U.S. 307, 324-25 n.9 (1985). By returning a guilty verdict under these instructions, the jury demonstrated that it found petitioner capable of forming criminal intent, thereby signaling its finding that Dr. Wetzler's testimony was insufficient to raise a reasonable doubt on that issue. Cf. Schneble v. Florida, 405 U.S. 427, 431-32 (1972) ("Judicious application of the harmless error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares us in the face"); see also Zant v. Stephens, 462 U.S. 862, 881 (1983) (rule of Stromberg v. California, 283 U.S. 359 (1931), does not apply where jury makes special finding rather than general verdict). If the basic principle of Sandstrom and In re Winship, 397 U.S. 358 (1970), is that the jury must find beyond a reasonable doubt all of the facts necessary for

13/ The court below distinguished Bowen on this ground. 842 F.2d at 1532 n.10, 1534 n.19, Pet. App. A-8, A-10.

conviction, Pope, 107 S. Ct. at 1927, see also id. at 1925 (Stevens, J., dissenting), that principle is satisfied here.

Petitioner concedes that any "case-specific flaws in the Court of Appeals logic do not warrant review." Petition at 20.[14] Since the process followed by the court below satisfies the underlying concerns of Sandstrom and Winship, this concession is reason enough to deny the writ.

2. There Are No Conclusive Presumptions in This Case.

Petitioner next asserts that the jury instructions contained two conclusive presumptions of intent which amounted to directed verdicts. He cites a number of cases from other circuits holding, or implying in dicta, that such instructions can or cannot be harmless error, and asserts this case falls within a conflict among the circuits which justifies review on this issue. The instructions in question are Preliminary Instruction 23 and Additional Instructions 30 and 34. Pet. App. A-36, A-38, A-41.

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[14] Each of the "case specific flaws" set forth in the petition at 19-20 was addressed by the Court of Appeals. As to the assertion that the jury could not have understood the instructions and may have disregarded them, see 842 F.2d at 1533 n.15, n.16, Pet. App. A-9. The court did not overlook Dr. Wetzler's testimony that petitioner did not know what he was doing. 842 F.2d at 1532, n.11, Pet. App. A-8. Finally, the court below expressly rejected the suggestion that a finding of the specific intents associated with the offenses of deliberate homicide by means of torture and aggravated kidnapping could co-exist with a reasonable doubt as to capacity to form other intents which were subject to the Sandstrom presumptions. 842 F.2d at 1533-34 and n.17, Pet. App. A-9 to A-10.

Additional Instruction 30[15] told the jury nothing more than that it should look to the circumstances of the offense and the presumed sound mind of the accused to determine his intent. As the court below noted, the jury was told the presumption of sanity was rebuttable and therefore not conclusive.[16] 842 F.2d at 1530 N.5, 1534. In light of the extensive instructions on proof of intent, Additional Instructions 29, 31, 32, Pet. App. A-37 to A-40, and the specific references to the jury's obligation to make a finding on the issue in the instructions defining each charged offense, no reasonable juror could have interpreted Instruction 30 in the manner suggested by petitioner.

Additional Instructions 23 and 34 defined the offense of deliberate homicide by means of torture. A reading of the instructions in full shows that they are not devoid of intent issues, as petitioner would have the Court believe. Both instructions require the jury to find beyond a reasonable doubt that petitioner "purposely assaulted Lana Harding physically and inflicted cruel suffering on her and in doing so caused her death" with one of three particular specific intents. The Montana Supreme Court held the instruction

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[15] "The knowledge or purpose with which an act is done is manifested by the circumstance connected with the offense and the sound mind of the accused. All persons are of sound mind who are not afflicted with a disease or defect of the mind which excludes responsibility for their conduct. Upon trial of the issue raised by the pleas of 'not guilty' to the charges made in the Information, the defendant is presumed to have been free from any disease or defect of the mind which excludes responsibility for his conduct at the time the offenses are alleged to have been committed and to be sane now." Pet App. A-38.

[16] Petitioner's proposed instructions at trial included an instruction as to the presumption of sanity: "Every man is presumed to be sane, that is, to be without mental disease or defect, and to be responsible for his acts." Defendant's Proposed Instruction 48, St. Ct. File Item 153.

[redacted]

proper as a matter of state law, State v. McKenzie, 186 Mont. 481, 509-510, 608 P.2d 428, 445, cert. denied, 449 U.S. 1050 (1980), and the jury was specifically told to resolve these intent issues without resort to Sandstrom presumptions. If petitioner had considered the entire instruction rather than simply the last two lines, he could not seriously argue that it omitted an intent requirement.[17/] In any event, even if these two instructions as to deliberate homicide by means of torture are construed as petitioner suggests, the argument would not affect the validity of the conviction and sentence on the offense of aggravated kidnapping. Barnes v. United States, 412 U.S. 837, 848 n.16 (1973); United States v. Romano, 382 U.S. 136, 138 (1965).

This case simply does not raise the issue of whether a conclusive presumption can be harmless error in light of Rose. The court below correctly found there were no conclusive presumptions in the instructions. 842 F.2d at 1530, Pet. App. A-6. The existence of conflicting circuit court decisions on an issue not presented here is not grounds to grant the writ in this case.

II. THE PRINCIPLES GOVERNING THE PLEA BARGAIN ISSUE ARE SETTLED AND NEED NOT BE RECONSIDERED BY THIS COURT.

Petitioner asserts that this case presents an important Eighth Amendment issue under this Court's decision in United States v. Jackson, 390 U.S. 570 (1968), arising from the trial judge's agreement to follow a tentative plea agreement

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17/ The court below can hardly be faulted for not addressing the assertion that Instructions 23 and 34 contain conclusive presumptions of intent which are not subject to harmless error analysis. Petition at 23 n.24. Petitioner's briefs in the court below did not assert that the instructions were the equivalent of a directed verdict on the issue of intent.

which was never made final.[18/] He argues that once a sentencing judge has agreed to abide by a plea agreement which contemplates a sentence to a term of years in exchange for a plea of guilty to two non-capital offenses, the judge may not impose the death penalty if the plea agreement is not completed and the petitioner is tried and convicted of two capital offenses.[19/]

The principles which govern this argument are well settled. This Court has observed on numerous occasions that it is not unconstitutional to reward a plea of guilty with leniency. Corbitt v. New Jersey, 439 U.S. 212, 219-20 (1978) (citing cases). The Court has also addressed the primary thrust of petitioner's claim--that the death sentence in this case resulted from the prosecutors' refusal to plea bargain,

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18/ Petitioner's reliance on Jackson is misplaced. Jackson concerned a statute which unnecessarily encouraged guilty pleas by providing a potential death sentence only for those defendants who pleaded not guilty. The Court struck the sentencing provision, not because of any Eighth Amendment concerns, but rather because it placed an undue burden on the defendant's rights under the Fifth and Sixth Amendments. 390 U.S. at 581. Nothing in the Court's opinion addressed the situation presented here, which the court below described as "precisely the converse" of Jackson, 842 F.2d at 1536, Pet. App. A-12 where the petitioner sought to plead guilty to lesser included offenses but was rebuffed by the prosecutor's refusal to dismiss the capital charges. See Corbitt v. New Jersey, 439 U.S. 212, 227 (1978) (Stewart, J., concurring) (distinguishing Jackson in plea bargain case). This Court has consistently rejected arguments, such as the one presented here, which sought to extend the Jackson holding beyond the narrow facts of that case. Corbitt, 439 U.S. at 216-17; Ludwig v. Massachusetts, 427 U.S. 618, 627 n.4 (1976); Middendorf v. Henry, 425 U.S. 25, 48 n.25 (1976); Fuller v. Oregon, 417 U.S. 41, 54 (1974); Chaffin v. Stynchcombe, 412 U.S. 17, 29-33 (1973) (citing cases).

19/ Petitioner's assertion that "[i]t was and is undisputed that the trial judge ... agreed to impose a sentence of imprisonment for precisely the same crime" involved in the plea bargain, Petition at 24, is not entirely accurate. The plea bargain discussions involved guilty pleas to two non-capital lesser-included offenses, not to the two capital crimes of which petitioner was convicted.

and was therefore impermissibly arbitrary. The petitioner in Gregg v. Georgia, 428 U.S. 153, 199 and n.50 (1976), presented the same argument to the Court. The plurality opinion squarely rejected the argument, holding that the existence of "discretionary stages" in the prosecution at which various actors may afford leniency to the accused did not render the system arbitrary and therefore violative of the Eighth Amendment.[20/] The Court recently reaffirmed this aspect of Gregg in McCleskey v. Kemp, 107 S. Ct. 1756, 1774-75 and n.28, 1778 n.37 (1987).

Petitioner's argument fundamentally misconstrues the Eighth Amendment concerns enunciated in Furman v. Georgia, 409 U.S. 238 (1972), and in Gregg. The Eighth Amendment is not concerned with seeing that all defendants who deserve the death penalty receive it. Rather, its concern is that those who do not deserve it are not arbitrarily sentenced to die. If the capital sentencing scheme is designed to eliminate this possibility and has functioned properly in doing so, the potential for leniency does not render the process unconstitutional. Gregg, 428 U.S. at 199; id. at 225-26 (White, J., concurring in the judgment); see McCleskey, 107 S. Ct. at 1774-75.

Petitioner's assertion that the sentencing judge was controlled by the prosecutors, who in turn were controlled by the Hardings, enjoys no substantial support in the record. As the court below noted, the judge had no legal grounds on which to control the prosecutors' decision to take the case to trial. 842 F.2d at 1537 n.25, Pet. App. A-13. If, in

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20/ Justice White's concurring opinion, joined by Chief Justice Burger and Justice Rehnquist, also rejected this argument, although in general terms. 428 U.S. at 225-56 (White, J., concurring in the judgment).

fact, the prosecutors controlled Judge Nelson, the Sandstrom instructions would never have been given in this case since, as petitioner observes, they were given over the prosecution's objections. As to the assertion that the Hardings controlled the prosecutors' decision to take the case to trial, the evidence presented at the evidentiary hearing was to the contrary. H. Tr. 301, 304, 316-17, 325-26, 357; Ethel Harding Depo. 9-10, 14; see FF 29, App. I-6.

The court below held the sentencing statutes applied here constitutional, rejecting petitioner's assertion that they did not satisfy Furman and Gregg. 842 F.2d at 1538-43, Pet. App. A-14 to A-19. Petitioner has not sought review of this holding in the present petition. The court below also held that the record reflects the judge's consideration of the circumstances which separated this case from other non-capital homicides: the statutory aggravating circumstances and the evidence evaluated by the trial judge which failed to show sufficient mitigation to call for leniency. 842 F.2d at 1537, Pet. App. A-13.[21/] This holding was manifestly correct, see infra at 23-25. Under these circumstances, the possibility that a lesser sentence might have been imposed if a plea bargain dismissing the capital charges had been reached does not invalidate the sentence. The Court should not upset these settled principles by reconsidering them here.

21/ Petitioner also asserted below that the statutory aggravating factors here did not function to narrow the class of homicides to which Montana's 1974 death penalty law might apply. The court below rejected this assertion, 842 F.2d at 1539-40, Pet. App. A-15 to A-16, and petitioner has not sought review of the issue here.

III. PETITIONER'S ASSERTION THAT THE SENTENCING JUDGE DID NOT CONSIDER THE FULL RANGE OF MITIGATING CIRCUMSTANCES IS NOT FACTUALLY SUPPORTED.

Petitioner asserts that the sentencing judge here failed to consider all of the mitigating evidence presented in the record, in violation of this Court's holdings in Hitchcock v. Dugger, 107 S. Ct. 182 (1987), and Eddings v. Oklahoma, 455 U.S. 104 (1982). Petitioner ignores the facts and the construction placed on Montana's 1974 death penalty statute by the Montana Supreme Court. According to petitioner, the mere existence of any fact in mitigation of sentence required imposition of a sentence less than death under Montana law. Petition at 27. This reading of the statute was considered and expressly rejected by the Montana Supreme Court in McKenzie v. Osborne, 640 P.2d at 382. The court there held that under the statute, once statutory aggravating factors are found, the sentencing judge is required "to consider a wide range of factors in determining whether the aggravating circumstances are outweighed by mitigating factors." The district court adopted this construction as well. Pet. App. B-28. Thus, the key question under the statute was not, as petitioner suggests, whether mitigating factors were merely present, but rather whether any such factors were sufficient to outweigh the aggravating factors and call for leniency.

The Montana Supreme Court also found in the same appeal that the trial judge fully considered the evidence of petitioner's mental condition and found it to be insufficient to outweigh the aggravating circumstances. 640 P.2d at 381-82. The district court in its consideration of this issue found itself bound by this factual finding under 28 U.S.C. § 2254(d) and this Court's decision in Sumner v. Mata,

449 U.S. 539, 546 (1981). The court below agreed with this finding. 801 F.2d at 1531, Pet. App. A-62.[22/]

It cannot seriously be argued that this finding "is not fairly supported by the record." The trial judge stated that he had reviewed petitioner's submission, St. Tr. 2612, and his findings discuss the issue in detail. Sentencing Order Finding of Fact 5, Pet. App. E-7 to E-8. The only evidence to the contrary cited by petitioner is the fact that the sentencing judge found "no circumstances which mitigate [petitioner's] conduct or the sentence to be imposed." Sentencing Order, Conclusion of Law 2, Pet. App. E-9. This statement, fairly read, indicates only that the judge concluded none of the factors offered by petitioner warranted leniency. It hardly constitutes the "convincing evidence" required by § 2254(d) to overturn the state court finding.

Petitioner simply ignores the facts and asserts that the trial judge did not consider the mitigating evidence. Hitchcock and Eddings require the sentencing court to receive and consider any evidence offered in mitigation, but the Court has specifically reserved to the sentencer the discretion to weigh the evidence. Eddings, 455 U.S. at 114-15. On the facts found by the courts below, there is no issue presented here as to whether the sentencing court complied with the rulings of this Court.

22/ The en banc court vacated parts II.A. and II.C. of the panel decision. 842 F.2d at 1543, Pet. App. A-19. The finding cited above is found in part II.E., which the en banc court did not disturb.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

DATED this 14th day of September, 1988.

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APPENDIX I

APPENDIX I

FILED

AUG 16 1985

LOU ALKSICH, CLERK

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

DUNCAN PEDER McKENZIE, JR.,
Petitioner,
-vs-
HENRY RISLEY, as Warden of Montana State Prison,
Respondent.

CV-81-170-GF

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for hearing before the Court on November 7, 1984. Petitioner appeared through his appointed counsel, Timothy K. Ford, and respondent through Assistant Attorney General Chris D. Tweeten. From the testimony and evidence submitted by the parties and the briefs and arguments of counsel, the Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The petitioner, Duncan Peder McKenzie, Jr., was convicted of deliberate homicide by means of torture and aggravated kidnapping in the death of Lana Harding, following a jury trial in the District Court of the Eighth Judicial District, Cascade County, Montana.

2. The petitioner's trial commenced January 8, 1975, and was concluded with guilty verdicts returned February 1, 1975.

3. The petitioner was represented at trial by Barney Reagan of Cut Bank, Montana, and Charles Jacobson of Conrad, Montana. The state was represented at trial by Pondera County

Attorney Douglas Anderson and Special Prosecutor David H. Nelson.

4. At the time charges were filed in district court, David H. Nelson served as Pondera County Attorney. With the approval of the presiding judge, he engaged the law firm of Sherman and Anderson of Conrad, Montana, to serve as special prosecutors on behalf of the State. William Sherman did little or no work on the petitioner's case, and Douglas Anderson provided virtually all of the special prosecution assistance through the end of 1974.

5. On March 28, 1974, after he had been appointed special prosecutor, Anderson filed as a candidate for the office of Pondera County Attorney.

6. Douglas Anderson was elected Pondera County Attorney in November of 1974. He took office during the first week in January, 1975, at which time David Nelson was appointed to serve as special prosecutor in petitioner's case.

7. The case was initially assigned to the Honorable R. D. McPhillips.

8. In September of 1974, Judge McPhillips was disqualified, and the Honorable Robert J. Nelson assumed jurisdiction.

9. On December 17, 1974, at a hearing in Great Falls, Judge Nelson informed counsel that he intended to give extensive preliminary instructions to the jury. Judge Nelson also set the final pretrial conference for January 6, 1975, and set the trial for January 8, 1975.

10. The prosecution and the defense had objected to the proposed preliminary instructions. The objections were overruled by Judge Nelson, and Preliminary Instructions 1 through 28 were given to the jury at the beginning of the trial.

11. During the spring of 1974, while the case was assigned to Judge McPhillips, there were some plea bargaining discussions between counsel, but no resolution was reached.

12. On December 20, 1974, Mr. Reagan, Mr. Jacobson, and Mr. Anderson met and discussed the case and the possibility of a plea bargain.

13. Plea bargaining was discussed by the prosecutors and the defense counsel during the next two days.

14. During those discussions, Mr. Anderson took the position that no plea bargain could be finalized or presented to Judge Nelson without first discussing it with Lana Harding's family.

15. In these discussions between December 20 and December 22, 1974, defense counsel informed Mr. Anderson that he thought there were problems with the prosecution's case. Defense counsel indicated that if a plea agreement were reached, then he would tell Mr. Anderson the problems that defense counsel saw in the prosecution's case. Defense counsel indicated that he would do this to help the prosecution explain to others why they had plea bargained.

16. Although Mr. Anderson initially resisted talking to the Judge before consulting with the Hardings, he finally agreed to do so because of the court's calendar.

17. On December 23, 1974, Mr. Jacobson met with the petitioner to obtain his written approval to enter into an agreement.

18. In the afternoon of Monday, December 23, 1974, all four attorneys met with Judge Nelson in Great Falls and discussed the matter of a plea bargain with him.

19. At the close of this meeting, both defense counsel believed in their minds that a final and binding plea bargain had been reached.

20. At the close of this meeting, both prosecutors believed in their minds that no binding agreement had been reached, but rather the framework for a proposed agreement had been set forth and tentatively approved by Judge Nelson.

21. After the meeting with Judge Nelson, the four attorneys went to the Sip 'N Dip Lounge, at O'Hair Manor, in Great Falls.

22. While there, defense counsel informed the prosecution of the difficulties they saw in the prosecution's proof, which included the nature of the chain of custody over certain items of evidence that had been seized from the defendant's house and truck, and the failure to endorse FBI agents by name on the information.

23. Neither of the disclosures made by defense counsel were matters unknown to the prosecutors. They were well aware that they had not endorsed the names of the FBI agent witnesses on the information. The evidence is uncontradicted that they did not know, and could not have known, which FBI agents would testify until a trial date was set. The issue

of chain of custody had been covered in the deposition of Sheriff Hammermeister in June of 1974.

24. On December 26, 1974, Barney Reagan prepared a written guilty plea on behalf of his client, Duncan McKenzie, and sent it to the office of Charles Jacobson for final preparation, together with a note which suggested that Mr. Jacobson show those documents to Mr. Anderson and Mr. Nelson for their approval.

25. Also on December 26, 1974, Anderson and David Nelson traveled to Polson, Montana, to discuss plea bargaining matters with Warren and Ethel Harding, the parents of Lana Harding, their son Gregg, and their attorney Jean Turnage.

26. En route to Polson, Anderson and Nelson stopped in Kalispell to discuss with State District Judge Robert Keller possible legal problems arising from Judge Nelson's preliminary instructions and the Montana Supreme Court's Rhodes decision. Judge Keller was a social acquaintance of David Nelson. Plea bargaining was not discussed at this meeting.

27. The meeting in Polson took place at an office in the Lake County Courthouse. Present were Anderson and David Nelson, Ethel Harding, Warren Harding, Gregg Harding and Joan Turnage, the Hardings' attorney. All persons present agreed in their testimony in this case that the prosecutors did not present the matter to the Hardings as a completed plea bargain.

28. The prosecutors discussed with Turnage the legal impacts of various federal death penalty cases and the Rhodes case. They considered the effect of parole on a sentence to

a term of years. After this discussion the Hardings told the prosecutors they opposed a plea bargain. They stated that they preferred to see the case tried on the original charges and that the courts should decide. No threats were made by anyone present at this meeting, against the prosecutors, defense counsel or anyone else, to induce the prosecutors not to plea bargain.

29. The prosecutors discussed the plea bargain during the 200-mile trip back to Conrad that night. At that time they determined that all the factors they were considering pointed toward taking the case to trial. The next day, December 27, 1974, Anderson discussed the preliminary instruction problem and the Rhodes case with Judge McPhillips.

30. Defense counsel were informed of the prosecutors' decision not to plea bargain on December 28, 1974.

31. On December 29, 1974, Mr. Reagan and Mr. Jacobson prepared a number of motions, including a motion to enforce plea bargain, and other motions preparatory to the trial in the case.

32. A hearing was held in Judge Nelson's chambers on December 30, 1974. The petitioner was present. At this hearing defense counsel presented a motion to withdraw plea supported by Reagan's affidavit stating that a plea bargain had been reached and broken. The court responded:

> Well, of course, this is plea bargaining and if they don't want to go through with plea bargaining, I don't suppose that they have to. What is the situation with regard to that? Do you want to proceed the way that you agreed with counsel last Monday, the 23rd of December, or just what is the situation with regard to what counsel has referred to?

David Nelson responded that the prosecution wished to discontinue plea negotiations and proceed to trial. The court responded: "All right, if that's the case why we will proceed to trial on the 8th of January." The court then rescheduled the final pretrial conference from January 6, 1975, to January 3, 1975, to accommodate a hearing he had scheduled on another matter in Helena, Montana. The prosecutors filed their objections to the court's preliminary instructions, and the court heard argument on them. The defense filed and presented some other pretrial motions in the hearing. At this point, Mr. Reagan made a record of his objections regarding plea bargining. The court then ruled on various pending defense motions, set the remainder of the pretrial calendar, and concluded the hearing.

33. On the first day of trial, the prosecution filed a motion to endorse on the information the names of 58 additional potential witnesses. These witnesses included the FBI agents who testified at trial and witnesses who would testify about the chain of custody of petitioner's pickup truck.

34. Defense counsel objected to the endorsement of these witnesses, partly on the ground that the need for their testimony had been revealed to the prosecution by defense counsel in reliance on the plea bargaining agreement, on December 23, 1974.

35. None of the above-referenced witnesses were identified as a result of the disclosures made by the defense at the Sip 'N Dip Lounge on December 23, 1974. The reason the FBI agents had not been identified by name was that the

prosecution did not know their names until mid-December 1974. The testimony of some of the chain of custody witnesses had not yet been developed when the third amended information was filed on September 30, 1974, but all of it had been completed before the meeting at the Sip 'N Dip Lounge on December 23, 1974.

From these Findings of Fact, the Court makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. This is a proceeding under 28 U.S.C. § 2254 and this Court has jurisdiction under 28 U.S.C. § 2241.

2. The petitioner has withdrawn the claim in paragraph 19 of the petition, and it will therefore be dismissed with prejudice.

3. There are no state court findings of fact on the issues presented in paragraph 13 of the petition to which this Court must defer under 28 U.S.C. § 2254(d).

4. The burden is on the petitioner to prove that his conviction or sentence is constitutionally deficient. Tollett v. Henderson, 411 U.S. 258, 266 (1973).

5. Due process requires that a final plea bargain agreement (not a proposal or a tentative agreement) which has been relied on to the detriment of a criminal defendant be honored.

6. A defendant's detrimental reliance must be justified before he can seek to have the plea bargain specifically enforced.

7. Even though the attorneys for the defendant may have subjectively believed that there was a final, binding plea agreement resulting from the December 23, 1974, meeting with Judge Nelson, the Court concludes that the evidence shows that there was no meeting of the minds among the four attorneys regarding a final, binding plea agreement and it was unreasonable on the part of the attorneys for the defendant to think otherwise.

8. Even in cases where it is reasonable to assume that a final, binding plea agreement has been reached, the actions taken by defendant and/or his attorneys in reliance on such an agreement must result in a detriment to him which implicates the constitutional guarantees of due process.

9, The Court concludes that the prosecution derived no material tactical advantage from the disclosures made at the Sip 'N Dip Lounge.

10. The Court concludes that the testimony and names of the FBI witnesses and the chain of custody witnesses were developed independently of defense counsel's disclosures.

11. While it is not the recommended practice to wait so long to list witnesses, the Montana Supreme Court held in the direct appeal of petitioner's case that Montana law was not offended by the listing of these witnesses on the first day of trial. State v. McKenzie, 186 Mont. 481, 502-03, 608 P.2d 428, 441-42 (1980), cert. denied, 449 U.S. 1050 (1980).

12. The witnesses added were not prejudicial to defendant. The addition of the names of the FBI agents did not surprise defendant, as he knew the content of their testimony

from reports received several months earlier. In its order the state district court was careful to provide defendant with protection against surprise and to ensure that defendant was able to prepare for the testimony.

The Court will enter an order in conformity with these Findings of Fact and Conclusions of Law and in conformity with the memorandum opinion also entered this day concerning petitioner's claims numbered 30 and 34 and petitioner's motion to reconsider the Court's order concerning claim number 22.

Done and dated this 16th day of August, 1985.

James F. Battin
Chief Judge

FILED

AUG 16 1985

JOHN ALEXSICH, JR., CLERK

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

DUNCAN PEDER McKENZIE, JR.,)
)
Petitioner,)
)
-vs-)
)
HENRY RISLEY, as Warden of)
Montana State Prison,)
)
Respondent.)

CV-81-170-GF

MEMORANDUM OPINION

This case is before the Court on petitioner's motion to reconsider the Court's prior ruling granting summary judgment in favor of respondent on claim number 22. The case is also before the Court on respondent's motion for summary judgment on claim number 30 which the Court reserved ruling upon pending the evidentiary hearing. For the reasons stated below, petitioner's motion to reconsider claim number 22 is denied, and respondent's motion for summary judgment on claim number 30 is granted.

Petitioner's claim number 22 alleged that the death penalty statutes applied to the petitioner were unconstitutional on their face. This Court held that they were not. Petitioner claims that this Court's holding is directly inconsistent with the case of United States v. Harper, 729 F.2d 1216 (9th Cir. 1984).

Even a casual reading of Harper discloses that the case is not at all in point. In Harper, the court considered the constitutionality of the death penalty provision of the Espionage Act, 18 U.S.C. § 794. The Espionage Act does not

contain substantive guidelines to control the sentencing judge's discretion in imposing the death penalty. The district court held that the sentencing court could supply the substantive guidelines which Congress had failed to include in the statute. The Ninth Circuit, however, found that the substantive guidelines must come from the legislative body enacting the statute, not from the courts. Harper, 729 F.2d at 1225.

In contrast to the Espionage Act, the death penalty statutes under which petitioner was sentenced contained the necessary substantive guidelines. Harper is obviously not controlling, and the motion to reconsider must be denied.

Claim number 30 of petitioner's petition alleges that petitioner's death sentence is constitutionally invalid because the sentencing judge agreed to impose a sentence of a term of years during plea negotiations and later imposed the death penalty following trial. Petitioner's claim must fail for two reasons.

First, as established by the Findings of Fact and Conclusions of Law entered this day, there never was a final, binding plea agreement. Second, the proposed plea bargain placed before the judge contemplated a plea of guilty to two non-capital crimes. The jury returned guilty verdicts on the capital crimes, and the death penalty was imposed on those verdicts. It is not unconstitutional to impose the death penalty on a defendant convicted of capital crimes that were not a part of the proposed plea bargain. See Corbitt v. New Jersey, 439 U.S. 212, 222-23 (1978).

The authorities relied upon by petitioner are cases in which the defendant refused to accept the plea bargain offered by the prosecution. See e.g., United States v. Jackson, 390 U.S. 590 (1968); United States v. Stockwell, 472 F.2d 1186 (9th Cir. 1973). In the instant case, the petitioner agreed to plea bargain; it was the prosecution's decision not to accept the plea and to go to trial. Petitioner cannot argue, as the defendants in Stockwell and Jackson did, that the sentencing judge was punishing him for refusing to plead guilty. Respondent's motion for summary judgment on claim number 30 must be granted.

The Court will issue an order in conformity with this memorandum opinion and in conformity with the Findings of Fact and Conclusions of Law also entered this day.

Done and dated this 14th day of August, 1985.

James F. Battin
Chief Judge

FILED

AUG 12 1985

LOU ALEKSICH, JR., CLERK
By KATHRYN L. WOODWARD
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

DUNCAN PEDER McKENZIE, JR.,
Petitioner,
-vs-
HENRY RISLEY, Warden of the Montana State Prison,
Respondent.

CV-85-199-GF

ATTORNEY GENERAL'S OFFICE
HELENA, MONTANA
AUG 19 1985
RECEIVED

ORDER

Petitioner in the above-entitled case has moved to proceed in forma pauperis and to have this petition consolidated with his prior petition, McKenzie v. Risley, CV-81-170-GF. The motion to proceed in forma pauperis will be granted, it appearing by way of petitioner's affidavit that he is without adequate financial resources to pay the costs. However, the Court will deny the motion to consolidate. The Court's decision in CV-81-170-GF will be issued very shortly, and there is no reason to delay that decision pending the resolution of the instant petition. Therefore,

IT IS ORDERED that petitioner may proceed in forma pauperis.

IT IS FURTHER ORDERED that petitioner's motion to consolidate is denied. In future proceedings in this case, however, the parties may make reference to the contents of the file in case number CV-81-170-GF, and it will not be necessary to duplicate the materials found therein.

IT IS FURTHER ORDERED that, pursuant to Rule 4 of the rules governing § 2255 cases, the respondent in this case shall file an answer or other pleading on or before September 16, 1985.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 12th day of August, 1985.

James F. Battin
Chief Judge

APPENDIX II

ADDITIONAL STATUTES INVOLVED

Section 95-501, Mont. Rev. Codes Ann. (1947):

> (a) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
>
> (b) As used in this chapter, the terms "mental disease or defect" does not include an abnormality manifested only by re-repeated [sic] criminal or otherwise antisocial conduct.

Section 95-502, Mont. Rev. Codes Ann. (1947):

> Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

Section 95-503, Mont. Rev. Codes Ann. (1947):

> (a) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish by a preponderance of the evidence.
>
> (b) (1) Evidence of mental disease or defect excluding responsibility is not admissible unless the defendant, at the time of entering his plea of not guilty or within ten (10) days thereafter or at such later time as the court may, for good cause, permit, files a written notice of his purpose to rely on such defense.
>
> (2) The defendant shall give similar notice when in a trial on the merits, he intends to rely on a mental disease or defect, to prove that he did not have a particular state of mind which is an essential element of the offense charged. Otherwise, except on good cause shown, he shall not introduce in his case in chief, expert testimony in support of that defense.
>
> (c) When the defendant is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and the judgment shall so state.

Section 95-2203, Mont. Rev. Codes Ann. (1947):

> No defendant convicted of a crime which may result in commitment for one (1) year or more

> in the state prison, shall be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court, unless the court deems such report unnecessary. The court may, in its discretion, order a presentence investigation for a defendant convicted of any lesser crime or offense.

Section 95-2204, Mont. Rev. Codes Ann. (1947):

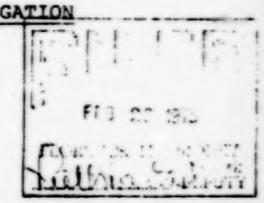
> Whenever an investigation is required, the probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish the probation officer on request the defendant's criminal record and other relevant information. The investigation shall include a physical and mental examination of the defendant when it is desirable in the opinion of the court.

APPENDIX III

APPENDIX III

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

THE STATE OF MONTANA, Plaintiff, -vs- DUNCAN PEDER McKENZIE, JR., Defendant.	Criminal Action No. 6593A PETITION AND MOTION IN MITIGATION



COMES NOW, the Defendant, and petitions and moves the Court to find and grant mitigation as follows:

1. That the Defendant was found guilty by the verdict of a jury on February 1, 1975, of the offenses of Deliberate Homicide and Aggravated Kidnapping; that upon both verdicts special interrogatories asked of the jury and were answered in the affirmative establishing a jury determination that the Deliberate Homicide was committed by means of torture and that the Aggravated Kidnapping resulted in death of the victim;

2. That both such verdicts may carry a purported mandatory penalty of death "unless there are mitigating circumstances" (the phrase quoted above is no longer found in the statute [94-5-304 M.C.C. 1973] covering aggravated kidnapping as the same was deleted in Section I of Chapter 126 of the Laws of 1974 which became effective March 11, 1974 which was 48 days after the events allegedly took place which form the basis for offenses charged in this cause).

3. That Defendant contends and asserts that the phrase, "unless there are mitigating circumstances", renders both statutes (94-5-105 and 94-5-304 M.C.C. 1973) unconstitutional as being violative of the rule expressed in Furman v. Georgia, 408 U.S. 238 (1973) as such provision allows discretion in the

determination as to what are and whether there are any "mitigating circumstances".

4. That both verdicts returned by the jury in this case are not general verdicts as required by statute to be returned by juries in criminal matters, but are either (a) a special verdict not authorized or permitted to be returned by a jury in a criminal matter or (b) a general verdict qualified by a special interrogatory not authorized or permitted by statute; that in either event, the verdict is contrary to both law and the evidence submitted or heard in this matter and the portion thereof containing this special interrogatory or special verdict should be disregarded by the Court as any legal or binding return by the jury, the jury being without power to so find, and the matter therein contained being matter for the Court's determination only. Upon sentencing, the Court should not feel bound to find in compliance with the answers given by the jury to the special interrogatories and such answers being contrary to the law and the evidence the Court should disregard the same in sentencing.

5. That the Court should not impose sentence or penalty upon this Defendant for both Deliberate Homicide and Aggravated Kidnapping, both offenses having arisen from the same transaction and each of said offenses being established by proof of the same or less than all the facts required to establish the other and that for the Court to impose sentence or penalty upon both Deliberate Homicide and Aggravated Kidnapping would constitute a violation of 95-1711 R.C.M. 1947;

6. It is generally understood that any person has the right to present matters in mitigation of sentence;

7. The Court herein has advised Defendant that it is receptive to, and will hear, any matter in mitigation;

8. However, the Defendant is at a loss to determine whether what the Court refers to is the mitigation spoken of in

the above described statutes or the mitigation generally allowable in any sentencing (unless of course the Court is without discretion in the setting or imposition of sentence);

9. The Court is surely aware of the mitigating circumstances relating to the Defendant's mental condition. Defendant had a well-recognized and qualified psychiatrist testify to the effect that Defendant so suffered from mental disease or defect that he could not have had the requisite intent and that such disease or defect should exclude responsibility. (The jury, however, did not find such mental disease or defect; however, Defendant asserts that the statutory method of presenting such concept to the jury precluded such finding and the Court's refusal to apprise the jury as to disposition of Defendant if such verdict were returned left them with the dilemma of either convicting Defendant or perhaps immediately turning him loose upon society since they were not informed as to the mandatory disposition after verdict of not guilty by reason of mental defect or disease excluding responsibility; that both psychiatrists and the psychologist all testified that Defendant certainly suffered from a "personality disorder" and that he was dangerous; the only difference of opinion was to the degree of such personality disorder; and that the Court should consider such proof presented by both the prosecution and the defense and the lack of proper instruction as a mitigating circumstance in imposing sentence;

10. The Court should further take into consideration that Defendant is but 23 years old; that he left his mother at age 12 and went to live with his itinerant ranch-worker father; that he has no friends or roots; that he is an indigent stranger to the Conrad and Great Falls communities and was and is unable to provide any character witnesses at trial or now; that he has a wife and three (3) children in the Chinook, Montana community and that society would benefit by returning him to them after

corrective medical treatment more than it would for punishing him for the sins society has done against him;

11. That the Eighth Amendment to the U. S. Constitution and Section 22 of Article II of the 1972 Montana Constitution prohibits cruel and unusual punishments; that no death penalty has been imposed and inflicted in Montana in over thirty years; that to impose such a penalty in this cause (where discretion is allowed) would be an abuse of that discretion and such would be the imposition of cruel and unusual punishment;

12. That the new 1972 Montana Constitution states in Section 28, Article II as follows:

"Laws for the punishment of crime shall be founded on the principles of prevention and reformation....";

That to impose a sentence of death would be in direct conflict with the mandate of this Constitutional provision; that the sentence of death is unconstitutionally violative of the above quoted Section of the Montana Constitution of 1972;

13. That this Court has heretofore entered into a plea bargaining agreement with counsel for the State and the Defendant on December 23, 1974; that although the Court has refused to specifically enforce said agreement of December 23, 1974, it has yet not broken it; that the Court therein promised Defendant that it would not impose a sentence in excess of fifty (50) years; that the U.S. Supreme Court has held that such agreements must be enforced in Santobello v. New York, 404 U.S. 257, 30 L.Ed. 2d 427, 92 S. Ct. 495; that the information obtained from the defense by the prosecution, and fully taken advantage of, by the prosecution, may well be the real basis for the jury's verdict in this cause; that the Court's sense of justice and fair play must well be involved by the action of the prosecution repudiating, and fully taking advantage of the unfair position obtained under the agreement all made and entered into on December 23, 1974;

WHEREFORE, Defendant prays the Court as follows:

1. To sentence upon a single verdict only and not upon both verdicts;

2. To disregard the special interrogatory answers given by the jury as verdicts which the jury was not entitled to decide and as contrary to both the law and the facts in evidence;

3. To find mitigating circumstances and to impose a mitigated penalty because of such finding;

4. To not impose a sentence of death; and

5. To impose a sentence not to exceed fifty (50) years.

DATED this 25th day of February, 1975.

BARNEY REAGAN
CHAS. L. JACOBSON
Attorneys for Defendant

By: Barney Reagan